REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL CASE NO. 433 OF 2010

MILIMANI LAW COURTS

JOEL NTHEI MWANZIA ……..……...……APPELLANT

VERSUS

PETER M. WAMBUA…….……RESPONDENT

JUDGMENT

This appeal arises from the judgment and decree of Honourable Ms Winfridah Boyani Mokaya, Principal Magistrate (as she then was) dated 28th May 2010 in CMCC NO. 13479 of 2004 at Nairobi Milimani Commercial Courts.

The appellant Joel Nthei Mwanzia who was the plaintiff in the court below sued the respondent Peter M. Wambua, the defendant, claiming for a refund of Kshs 200,000/- together with costs and interest at court rates being the amount due and owing by the defendant/respondent to the appellant/plaintiff in respect of monies lend in September 2003 together with interest thereof at the defendant/respondent's request. The respondent filed defence to the claim, denying the whole claim and put the appellant to strict proof thereof.

The Respondent also pleaded in the alternative that he had a joint business venture with the appellant/plaintiff who alleged that the defendant had misappropriated funds and that the appellant used the police to coerce the respondent into signing an acknowledgement that he owed the appellant Kshs 100,000/- together with interest at 100% totaling to Kshs 200,000/- payable within 3 days. The respondent also averred that the said acknowledgement was null and void for it was obtained through coercion and further, that the acknowledgement is illegal and irregular as the appellant/plaintiff was not an authorized legal money lending institution to purport to charge interest at 100% within 3 days of lending.

The plaintiff/appellant filed reply to defence denying that he coerced the defendant/respondent into signing an acknowledgement demanding for the said sums of money.

The appellant filed an application seeking to strike out the defence filed by the respondent but the court declined to strike out the defence, paving way for the suit to be set down for hearing on merit.

After hearing the parties, the trial magistrate dismissed the plaintiff/appellant's case, prompting this appeal by the plaintiff/appellant.

The Memorandum of Appeal filed on 21st October 2010 raises 6 grounds of appeal namely:

1. **The learned trial magistrate erred in law and fact in dismissing the plaintiff's case.**
2. **The learned trial magistrate erred in law and in fact in holding that the plaintiff had failed to prove his case.**
3. **The learned trial magistrate erred in law and fact in failing to appreciate that the defendant's defence was a mere denial.**
4. **The learned trial magistrate erred in law and in fact in basing her decision on the defendant's evidence that was not corroborated and which failed to discharge the burden of proof.**
5. **The learned trial magistrate erred in law and fact in finding that the defendant's testimony cast serious doubts on the plaintiff's testimony.**
6. **The learned trial magistrate erred in law and in fact by disregarding the plaintiff's evidence in toto.**

The appellant prayed that the appeal herein be allowed, the judgment in Milimani CMCC 13479/2004 be set aside and the verdict be entered in favour of the appellant with costs.

The appeal herein was admitted to hearing on 11th July 2012 and directions were given on 19th November 2012 after the appellant filed a supplementary record of appeal on 23rd October 2012.

The parties agreed to have the appeal disposed of by way of written submissions which they dutifully filed and exchanged. In support of the appeal and grounds, the appellant submitted that the trial magistrate erred in law in basing her findings on issues of illegality and fraud which issues were never pleaded by the Respondent in his defence and which issues made the trial court cast doubts on the plaintiff's solid evidence. The appellant relied on the authority of Galaxy Paints Co. Ltd vs Falcon Guards Ltd (2000] EA 885 where the Court of Appeal held that:

"The issue of determination in a suit generally flowed from the pleadings and the trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the courts' determination. Unless pleadings were amended, parties were confined to their pleadings Grandy v Caspair[1956] EACA 139 and Fernandez v People Newspapers Ltd[19722]considered."

The appellant also relied on Halsbury's Laws of England 4th Edition VOL. 36 at paragraph 48 page 33 to advance the argument that the defendant must in his defence plead specifically that which he alleges makes the action not maintainable in law to avoid taking the plaintiff by surprise, or which raises issues of fact not arising out of the statement of the claim.

In addition, the appellant contended that the respondent having introduced a third party a Mr Michael Mwanzia, it was upon him to discharge the burden of proving that the said Mwanzia was involved in the transaction. The appellant accused the trial magistrate of shifting the burden of proof to the appellant to call Michael Mwanzia to refute allegations by the respondent /defendant and lend credence to the plaintiff's testimony. The appellant further relied on **Halsbury's Laws of England 4th Edition Vol. 17** where it was stated that:

" while evidential burden initially rests upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies so will the evidential burden shift to the party who would fail without further evidence."

In the appellant's view, the trial court erred in stating *th**at "in order to answer the allegations raised by the defendant, it was imperative that Michael Mwanzia be called so as to refute those allegations and perhaps lend credence to the plaintiff's testimony."***

The appellant submitted that it was the defendant/respondent's evidence that would have collapsed without Michael Mwanzia being called to corroborate the same and therefore the burden shifted to him. The appellant also relied on the case of **Salem Ahmed Hasson Zaidi Vs Faud Hussein Humeidan (1960 EA** that "***if a party neglects to produce evidence and to prove his claim as he is bound to do, the court can proceed to decide the suit on such material as is actually before it, and that decision***

so produced shall have the force of a decree on the merits notwithstanding the defaults of the party."

The respondent

This being the first appeal, this court is enjoined by Section 78 of the Civil Procedure Act to analyze, re-evaluate, examine and interrogate asses the evidence before the lower court as a whole and arrive at its own independent conclusion, bearing in mind that unlike the trial court, it did not have the advantage of hearing and seeing witnesses as they testified. See the case of **Kenya Ports Authority vs Kuston (K) Ltd (2009)2 EA 212;Attorney General & 6 others vs Mohamed Balala & 11 others (2014) e KLR and Selle vs Associated Motor Boat Co. Ltd (1968) EA 123** where the above principle espoused on **Section 78** has been developed further.

Assessing the evidence on record as above, the appellant contends that the trial magistrate introduced new evidence of fraud contrary to the issues framed by the parties, citing **Grandy vs Caspain (1956) EACA 139 & Fernanden vs People Newspapers Ltd (1972) EA .**

That the trial court based its findings on illegality and fraud that were never pleaded by the respondent in his defence which issues made her cast doubts on the appellant's solid evidence.

The respondent on the other hand submitted that only grounds 3,4 and 5 constitute valid grounds of appeal maintaining that his defence was not a mere denial as he had raised the issue of the appellant having coerced him into signing an agreement dated 23rd September 2003 in which the respondent is said to have acknowledged his indebtedness to the appellant, which agreement was voidable and vitiated by coercion.

Further, the respondent submitted that the issue of illegal interest of 100% charged within 3 days yet the appellant was not a licensed money lending institution by Central Bank of Kenya Act was critical to the validity of the claim. The respondent therefore maintained that his defence had material that had to be assessed and were correctly assessed by the trial magistrate.

On whether the defendant's evidence was not corroborated and therefore the trial magistrate erred in law and fact in accepting uncorroborated evidence adduced by the respondent which evidence failed to discharge the burden of proof, the respondent submitted that the burden of proving that the respondent owed the appellant the claimed sums of money was always with the appellant as espoused in section 107 of the Evidence Act that:

"Whoever desires the court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

The respondent therefore submitted that it was not his duty to prove that he was indebted to the appellant as he had no counterclaim against the appellant and that the trial magistrate would still have dismissed the suit even if the respondent did not adduce evidence to prove anything in defence, citing section 3(4) of the Evidence Act that ***"a fact is not proved when it is neither proved nor disproved."***

The respondent maintained that there was no proof that the appellant gave to the respondent Kshs100,000 as alleged as he never called any witness to support that allegation which was denied by the respondent who admitted signing the agreement under duress, which could not be construed to mean admission of the claim.

On whether the trial magistrate erred in finding that the respondent's evidence cast serious doubt on the appellant's testimony, the respondent submitted that he was intimidated into signing the agreement using policemen after the illegal money minting deal that the three parties- the plaintiff, the respondent and Mr Michael Mwanzia failed to materialize.

It was submitted by the respondent that it was the illegal printing of money that would explain the unconscionable interest of 100% in 3 days in the agreement which the respondent was coerced to sign and

which evidence by the respondent cast serious doubt on the appellant's case. The respondent urged this court to uphold the trial magistrate's findings and decision and dismiss this appeal with costs.

having set out the parties' respective positions, the two main issues for determination in this appeal from my evaluation of the record are whether the appellant proved his case against the respondent on a balance of probabilities and what orders should this court make.

The appellant's case is that he lend the claimed sum of money to the respondent who promised to repay it within 3 days with interest of 100%. On the other hand, the respondent claims that the appellant was involved in illegal money minting business with a third party Mr Michael Mwanzia to whom the appellant gave money for multiplication and when the money failed to multiply, since the three people were involved in the same business, the appellant coerce d the respondent using policemen to sign an agreement to the effect that the respondent owed the appellant Kshs 200,000 inclusive of interest of 100% in three days.

The ancillary question that emerges from the above scenario is whether the agreement signed by the respondent was unconscionable and therefore incapable of enforcement by the appellant.

According to **Black's Law Dictionary**, an unconscionable contract is defined as;-

" Traditionally a bargain is said to be unconscionable in an action at law if it was "Such as no main in his senses and not under decision would make on the one hand, and as no honest and fair man would accept on the other……."

Case law has also given deviant prescription of an unconscionable, unreasonable and oppressive agreement for interest. In **Danson Muriuki Kihara vs Amos Kathua Gathungo (2012) e KLR** the court found a provision for interest of 50% per month which equals 600% per annum to be unconscionable because no man in his senses and not under delusion would agree to such interests rate. The court in the above case noted that not even Banks which are authorized to charge interest do charge those kinds of rates and no honest or fair man would make such an offer to a friend. The rate charged was therefore found unreasonable and oppressive to the respondent even though the parties had agreed.

In **Angelus Akinyi Otieno Vs Malaba Malakisi Farmers Operative Union Ltd (1998) e KLR** the Court of Appeal found a charge of interest at the rate of about 284% per cent per annum to be obviously ***manifestly harsh, unconscionable, oppressive and so exorbitant that no reasonable court would conscientiously countenance it***. Indeed, the Court of Appeal found that that kid of interest was ***farcical and ridiculous beyond all reason***.

Applying the above cases to this appeal, and while this court cannot purport to rewrite a contract for the parties, I regret that his court cannot under any circumstances, be called upon to enforce an agreement that on the face of it is characteristically unconscionable and oppressive. The respondent in my view did prove that the bargain was, as discernible from the plain sight of it, heinous that in the plain sight of any court, it is farcical and ridiculous beyond all reason, unconscionable and extremely unfair of a contract. In my view which is, no fair or honest person would make such offer or demand from another. It is in my view that the agreement signed by the respondent is so unconscionable, oppressive and unreasonable ***that no reasonable court would conscientiously countenance it*.** This can be discerned from the fact that the purpose of the money lend was not disclosed. In addition, how would one pay interest of 100% in three days even if it was a matter of life and death, and the lender thereof expect a court of law to enforce such an agreement out of desperation?

This court would not interfere or redraw (rewrite agreements between parties save that it must intervene where the agreement, on the face of it is illegal or the interest charged as is the case here is illegal or unconscionable or appears fraudulent, un reasonable or oppressive.

Parties are bound by and should be committed to the terms of the contract but this is not the kind of

contract that a court of law can enforce as it would lead to absurdity.

The question is, could the appellant charge such interest? And if so, on what or whose authority and for what? And under what provisions of the law? I agree with the respondent's submissions that the appellant did not prove that he was a registered money lending institution and even if he was, the respondent did spill the beans on the kind and type of business that the appellant civil servant was engaged in.

In ***CA Nairobi Civil application 320/2006 Kanwal Sarjit Sighn*** *Dhimani vs Keshavji Jivraj Shah* [2008] eKLR where the respondent and appellant entered into agreement for the former to lend to the latter Kshs 13,000,000 in three installments which loan was repayable with interest at 36 % per annum,there was default and the respondent sued for recovery. The appellant contended that he entered into the agreement through duress and coercion and that the respondent's interest was to illegally acquire the appellant's property; and that the contract was illegal as the respondent was not authorized to operate as the money lender or to charge such high interest which was unconscionable. He therefore sought declaratory orders that the agreement was null and void and unenforceable in law. The other issue raised in the above case was whether such agreement must be registered and stamped under the Stamp Duty Act. The Court of Appeal allowed stay pending appeal on the ground that the issues raised above were serious.

The appellant herein contended that coercion is a criminal offence and that it is expected that the respondent would report to the police for investigations. However from the evidence on record, the appellant used the police who are the-would- be enforcers of the law, to coerce him into signing an acknowledgement of such an absurd and illegal transaction. In my view, the agreement was not entered into freely between equal parties with their eyes wide open. I find that in as much as there was this agreement, I do not believe that the respondent received any money from the appellant capable of being refunded to the appellant. And even if the appellant was not involved in the illegal activities of printing money in concert with others , the business of illegal money rending scheme is discernible from the immoral interest of 100% charged for the respondent purported staying with the said money for only 3 days! The appellant's testimony did not disclose the purpose for which the money was urgently lend and refundable in 3 days with that kind of interest. It is also not clear from what sources the respondent would raise 200,000 in 3 days, noting that he was a telephone operator and both the appellant and respondent worked in the labour office at Nakuru and that the appellant was the respondent's boss.

Furthermore, the appellant's own testimony in the lower court betrayed him to the extent that the plaint claimed he lend the respondent Kshs 200,000 whereas his testimony says he lend the respondent Kshs 100,000 and charged interest of 100% making it 200,000 repayable in 3 days? This was a direct claim for liquidated damages. Parties are bound by their pleadings and he who alleges must prove. See Section 107,108,109 of Evidence Act. The appellant pleaded in his plaint that he lend Kshs 200,000 together with interest which was not disclosed. He nonetheless testified that he lend kshs 100,000 and charged 100% interest. In my humble view, the appellant failed to prove his case on a balance of probabilities against the respondent. The learned trial magistrate was therefore correct in dismissing the appellant's suit.

It was not upon the respondent to prove that he did not owe the appellant any money pursuant to the agreement which as I have stated and is worth repeating it here that the agreement was illegal. The respondent had no counterclaim against the appellant. Neither did the respondent give security for the money lend. In other words, was there any guarantee/security given by the respondent to the appellant to guarantee the refund of the money in 3 days? In my view, the appellant must have known that the respondent was incapable of repaying that kind of money in 3 days since he had not lend him anyway, and only wanted something forcefully written to cover up the illegal activities and share the loss with his partner in crime!

That purported agreement, to say the least, was and is illegal and is void for all purposes and this court and indeed, any other court of law cannot enforce such an agreement.

Albeit the appellant alleges that the respondent did not plead or prove fraud against or committed by the

appellant, It is my view that there are so many loose ends in the whole transaction that lead to an irresistible conclusion /inference that the whole affair was riddled with fraudulent intentions, particularly when the appellant failed to completely disclose the purpose the purpose for which money was urgently needed by the respondent and from what sources the respondent would reimburse in 3 days. The contract was not genuinely and properly executed.

The respondent's defence and submissions that the transaction involved illegal business of printing fake money cannot be far off the mark in the circumstances of this case.

Having found that the respondent confessed to have been involved in illegal activities of money printing in concert with the appellant and therefore the appellant's partner in crime, although costs follow the event, I decline to award the respondent costs of this appeal. A party should not be allowed to benefit from an illegal transaction. I therefore set aside the order for costs awarded to the respondent by the trial court for reasons that parties should not be allowed to benefit from proceeds of crime.

The upshot of all the above expositions is that I dismiss the appeal herein and order each party to bear their own costs of the appeal an of the lower court.

Dated, signed and delivered in open court at Nairobi this 14th day of May 2015.

R.E. ABURILI

JUDGE

14/5/2015